(412)644-5754

DATE: NOVEMBER 26, 1997

CASE NO: 97-ERA-16

In the Matter of

ALFIO ADORNETTO
Complainant

v.

PERRY NUCLEAR POWER PLANT
Respondent

Appearances:

Alfio Adornetto
Pro Se

Mary E. O'Reilly, Esq.
Donna M. Andrew, Esq.
For the Respondent

BEFORE: DANIEL L. LELAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851, which prohibits Nuclear Regulatory Commission Licensees from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. Alfio Adornetto (complainant) filed a complainant under the Act on October 18, 1996, which was investigated by the Wage and Hour Division and found to be without merit. Complainant made a timely request for a hearing before an administrative law judge, and a hearing was held before the undersigned in Cleveland, Ohio on June 3, 1997. Complainant's exhibits (CX) 1-2 and Respondent's exhibits (RX) 1-15 were admitted into evidence. At the close of the hearing, the parties were given sixty days to submit briefs, and the due date for filing timely briefs was later extended to August 11, 1997. Both parties filed timely briefs.

Summary of Evidence

Complainant began working for Perry Nuclear Power Plant on January 29, 1985. (TR 10). He was hired as a senior engineering technician in the Instrumentation and Control Unit (I&C). (TR 10) His duties included calibrating the instrumentation and running administrative procedures. (TR 11-12) In 1991, he was promoted to advanced instrument technician. (TR 12) It is his opinion that he was given this promotion because of allegations he made to the Nuclear Regulatory Commission (NRC) in 1990. (TR 13) But, he also testified that he believed his promotion was performance based as well. (TR 13).

Perry Nuclear Power Plant (PNPP) is a commercial nuclear power plant under 10 C.F.R. Part 50 and is licensed by the NRC. PNPP is co-owned by wholly-owned subsidiaries of Centerior Energy Corporation. Centerior has been in the process of downsizing through early retirement and a selective severance program since approximately 1990. (TR 182-183) The selective severance program has been in place at PNPP since 1993. (TR 184)

Complainant testified that on April 16, 1996, he went to see the NRC resident inspector for PNPP, Don Kossloff. (TR 38) He testified that he gave Mr. Kossloff a list of things that he considered unsatisfactory with the plant. (TR 38) A letter from the NRC, dated May 15, 1996, confirming Complainant's April 16, 1996 conversation with an NRC resident inspector, states that the two concerns raised by Complainant were: that he had been treated differently than the other I&C technicians since he raised a procedural adherence concern to management in 1990, and that the Quality Assurance methods to close this issue in 1990 were inadequate. (RX 1) Complainant testified that the two concerns he raised at the April 16, 1996 meeting did date back to a visit he made to the NRC in 1990. (TR 54)

The NRC conducted an investigation into Complainant's allegations and sent Complainant a letter with its findings on May 23, 1996. (RX 3) As to Complainant's first allegation, and a subsequent conversation with Complainant on May 20, 1996, no specific acts of discrimination were identified and no further investigation was going to be made. The NRC's investigation of Complainant's second concern revealed that the NRC had reviewed the complaint concerning I&C procedural adherence separately from the plant's review in 1990 and had concluded that there was no evidence that the I&C management did not require appropriate compliance with procedures.

Complainant testified that after he received these letters, he felt that he was being harassed by I&C management. (TR 41) He stated that one day he walked into a safety meeting a minute late and after the meeting, he was told by his supervisor that whenever he was going to report late, he had to report to a supervisor. (TR 42) Another incident occurred when he called and said he was going to take an hour of personal time to take his son to school. A few hours later, he was called into his supervisor's office and told to take his son to school early, but report

to work on time. (TR 42) When he gave fourteen days notice for some vacation time, he was told that he had to give thirty days notice. He testified that other technicians have given one to two days notice and it has not been a problem. (TR 42).

In June of 1996, Complainant testified that he raised concerns internally to the ombudsman, Quality Assurance, security and human resources, which included concerns about plastic bags in a containment area, a procedure signed by the same person as preparer and reviewer, procedural noncompliance concerns, and fitness for duty concerns in the I&C involving the abuse of alcohol and prescription drugs. (TR 69-71)

Henry Hegrat was the quality control section manager during the summer of 1996. The quality control section supervises the corrective actions unit. (TR 297) The corrective actions unit or Perry Issue Forum (PIF) is a program that allows any site employee to report a concern if something is not meeting the standards or expectations of the plant. The concern will be formally investigated and any corrective actions will be taken. (TR 298) Employees are encouraged to use this program and in 1996 there were 3800-3900 PIFs filed. (TR 298-299) Employees can also use the ombudsman program to report concerns. The ombudsman is trained to handle confidential inquiries into concerns and raise them to the appropriate levels of management at the plant. (TR 302)

Hegrat testified that Complainant filed four ombudsman concern reports on May 9, 1996. (TR 313-315) They were investigated and disposed. (TR 313-315) Hegrat testified that he called a meeting with Complainant on May 21, 1996 in regards to a discussion Complainant had with a quality control inspector, raising the issues of procedural noncompliance, ombudsman concerns, and fitness for duty concerns. (TR 306) Complainant told Hegrat that he did not want to discuss his concerns with his supervisors because he felt that they were building a case against him and he would get the "terrible tech" answer. (TR 307) Complainant would not fill out any PIFs forms on his concerns because he did not think that the PIF process was going to address the issues either. (TR 307, 309) He told Hegrat that he had already gone to the NRC and the ombudsman about these concerns. (TR 307) Hegrat assigned two quality control inspectors to write up and investigate the safety and technical issues Complainant had raised during the meeting. (TR 309) Hegrat told Complainant that his concerns involving his treatment by his supervisors needed to be addressed by management and human resources. He also told Complainant that he needed to take his fitness for duty concerns to the plant's security organization immediately. (TR 308) The result of the investigation into the two PIFs that Complainant raised during the meeting was that one was rated a Category 3 and the other a Category 4. (TR 311) PIFs are rated from Category 1 through 4 with a Category 1 being an issue of grave severity to the plant. (TR 304)

Joseph Slike is the Access Authorization Unit supervisor at PNPP. (TR 317) One of the programs his unit oversees is the fitness for duty program. (TR 318) Because of Complainant's fitness for duty concern, he arranged a meeting with Complainant on June 4, 1996. (TR 319) Complainant's concern was that there was an individual in the I&C unit who had reported to work smelling of alcohol. Complainant told a supervisor, but nothing was done about it. (TR 319)

During the meeting, Complainant explained to Slike that it was not just one incident that had taken place and he raised concerns about the entire I&C unit that had taken place over eleven years. (TR 320) Complainant would not name any of the individuals involved during this meeting. (TR 320) Slike noted in a memo he made of the meeting that he thought Complainant was coming forward with these concerns because he was concerned about losing his job. However, because of the seriousness of Complainant's allegations, he began an investigation. (TR 320) Several individuals in the I&C unit were interviewed. (TR 321) Slike's investigation was concluded the first week of September. (TR 326) The incidents had either been dealt with in accordance with plant procedures or did not involve fitness for duty issues and had been dealt with accordingly. (TR 322-326)

Complainant testified that on August 22, 1996, Jimmy Wright talked to the I&C unit and stated that no one was going to be discharged from the unit that day. (TR 43) The next day, when he reported to work, Complainant was called into a meeting with Wright and Ted Lutkehaus. (TR 43) He was told that the company was downsizing and that he was the individual that they had chose to downsize. (TR 44) Since investigations were ongoing into allegations he had filed, he was informed he would be kept on the payroll until the investigations were completed, but he was no longer to report to work at the plant. (TR 44) Complainant went to the NRC resident inspector Don Funk and alleged employment discrimination for reporting his concerns internally. (TR 80-82; RX 4) Complainant was informed that the internal investigations had been concluded and he was discharged on September 13, 1996. (TR 44) Complainant was offered a severance package, but refused it. (TR 45)

Complainant testified that he was told he was chosen to be laid off due to his performance. (TR 46) Complainant and Respondent stipulated to PNPP's forced rankings which had Complainant ranked 37th out of 54 I&C technicians in 1993, 35th out of 38 in 1994, 35th out of 35 in 1995 and 34th out of 34 in 1996. However, Complainant testified that a layoff was not necessary in his unit because the I&C unit hired two technicians eight months before he was laid off and two technicians two to four months after he was discharged. (TR 45-46)

James Dailey, the lead supervisor of Human Resources at PNPP testified that PNPP has been restructuring and downsizing since 1993. (TR 184) He explained how the selective severance process works at the plant. The management team determines what the staffing level should be in each unit in the corporation and makes reduction recommendations. This goes down to the supervisory level where it is reviewed, then it comes back up to management where the recommendations are discussed again, and the recommended staffing reductions are then submitted to the human resources review board where the severances are either approved or rejected. The board consists of the vice president of administration, at least one attorney, the director of human resources and the site human resources representative. (TR 189-190) If a candidate for severance is rejected by the human resources review board, then it is sent back to

management for reconsideration. (TR 185-186) The report the human resources review board receives on candidates recommended for severance includes candidates organized by their unit and their social security number, but it does not contain an individual's name. (TR 189)

Dailey also explained how the forced ranking system works. One person in a work group is determined as the best and each employee in that group is ranked accordingly. (TR 187) Forced rankings are done to determine salary administration and they are used for the selective severance program. (TR 187) Some of the criteria involved in determining an individual's rank are performance appraisals, the jobs an employee performs, an employee's skills, and how that fits in with the needs of the plant. (TR 187, 211) No one individual determines the forced ranking for a work group. It begins at the supervisor level and is reviewed by the superintendent, the manager, the director and then the directors and the management team get together and review the final rankings. (TR 188-189)

Dailey testified that 175 employees were laid off in 1996. (TR 183) Complainant was a candidate for severance who was reviewed by the human resource review board along with several other individuals on July 16, 1996. (TR 196; RX 10) The minutes from that meeting identify Complainant by his social security number and state that his severance has been approved. It also states "Elimination of one person in the unit identified. This employee is rated last in the performance ratings." (TR 196-197; RX 10)

Ted Lutkehaus, a management consultant with Technical Management Services, Inc., worked at PNPP for two and a half years as the maintenance section manager. (TR 213, 215) He was hired to improve the maintenance programs at the plant. (TR 214) The I&C unit was one of the units that reported to him. (TR 216) He testified that the type of employee he needed in the maintenance section was an individual who was self-motivated, accurate, self-critical, had a high degree of technical skill and could be cross-trained. The goals were to reduce the number of supervisors needed and to better utilize individuals on the job. (TR 217-218) Lutkehaus testified that in January of 1996, the plant was in a refueling outage and the maintenance unit improvement plan was being implemented at that time. The maintenance unit was planning to add a few more people because it had defined functions that did not exist before in maintenance and individuals were needed to perform these functions. (TR 220-222)

On May 6, 1996, Lutkehaus attended a meeting with Tim Martin, senior management and all of the managers at PNPP. The managers were given the staffing levels that the plant wanted to accomplish. (TR 222-223) It was at that time that it was decided a position in the I&C needed to be cut. (TR 237) He testified that rumors about a layoff had been rampant around the plant before the meeting and that it was generally known there was going to be a selective severance program implemented at the plant in 1996. (TR 226) PNPP announced the staff reductions in a weekly plant newsletter dated May 9, 1996. (TR 225; RX 11) Lutkehaus further testified that the candidates who were selected for severance in the maintenance unit were determined by their performance, not their seniority at the plant. (TR 229)

Charles Moore, an I&C supervisor at PNPP, testified that he was Complainant's supervisor until July of 1995, when he began a thirteen month training course for a reactor operator's license at the plant. (TR 329-330) He testified that Complainant is technically skilled, but he lacks motivation. (TR 330) Moore testified that sometime around June 10, 1996, when he was on cigarette break, Complainant approached him and said "I did it." (TR 334, 331) When Moore asked him about it, he told Moore that he had gone to the ombudsman, NRC, QA and security. Complainant said, "I know there is a layoff coming and I'm going to cover my butt any way I can." (TR 331)

Jimmy Wright is the I&C superintendent at PNPP. (TR 248) Complainant's supervisor reported to him. (TR 250) There are currently 31 technicians in the I&C unit at PNPP, in 1985 there were 55 technicians in the unit. (TR 251) He testified that an individual who is working at PNPP now is challenged to more than he or she has done on the past. (TR 251) A good I&C technician is technically competent, reliable, and self-motivated. (TR 258) Wright testified that he was familiar with Complainant's work. (TR 257) His opinion was that Complainant was technically competent but he needed more supervision than the average technician. He was not a self-starter. (TR 258) His direct supervisors took steps to improve his performance. They tried weekly consults to tell him what was expected and checked on him to ensure he was meeting those expectations. (TR 259) His performance did improve at that time. (TR 260) Complainant has continued to fall in his rankings since 1993 because he was maintaining his status quo. Other technicians have moved ahead of him because they have been paying attention to the goals and the standards of the company. (TR 260-261)

Wright was first aware that a position in the I&C unit was going to be eliminated on May 6, 1996. (TR 262) He called the supervisors into a meeting to determine who would be released. Many of them had supervised Complainant at one point or another. They used the forced ranking list, but they also discussed whether Complainant was the proper person. He testified that the consensus was that Complainant should be dismissed. (TR 263)

Wright testified that there were not four new hires in the I&C department in 1996. Two individuals were hired around the end of 1995, beginning of 1996. The other two individuals were transferred from supervisory and specialist positions within the I&C back to technicians in the plant's restructuring. (TR 269, 278) The two new hires were not on the forced ranking list because that list was compiled in the December/January time frame and they had not had a performance appraisal. (TR 270) They were considered when the discussion took place as to who was going to be laid off. (TR 270) Complainant's position has been eliminated and no one has been hired or transferred into that position. (TR 273) Wright further testified that he was not aware Complainant had gone to the NRC at the time he was selected for severance. (TR 289)

Findings of Fact and Conclusions of Law

42 U.S.C. § 5851 provides that:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954;
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such proceeding or in any other action to carry out the purpose of the Atomic Energy Act of 1954, as amended.

To establish a prima facie case of discrimination under § 5851, the complainant must show: (1) his employer is subject to the Act; (2) the complainant engaged in protected activity; (3) the complainant was subject to the adverse employment action; (4) his employer was aware of the protected activity when it took the adverse action; and (5) an inference that the protected activity was the likely reason for the adverse employment action. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y, January 18, 1996). *See also Carroll v. U.S. Dept. of Labor*, 78 F.3d. 352 (8th Cir. 1996). If the complainant proves a prima facie case, the burden of the production shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse action. *Carroll*, 78 F.3d. at 356. Where the employer articulates a legitimate nondiscriminatory reason for the adverse action, the complainant has the ultimate burden of persuasion that the reasons articulated by his employer were pretextual, either by showing that the unlawful reason more likely motivated the employer or by showing that the proffered explanation is unworthy of

credence. *Nichols v. Bechtel Construction Co.,* 87-ERA-44 (Sec'y, October 26, 1992); *Carroll, supra; Kahn v. U.S. Secretary of Labor,* 64 F.3d. 271, 278 (7th Cir. 1995).

Respondent concedes that it is subject to the Act. Complainant's allegations of discrimination to the NRC are considered protected activity as defined by 42 U.S.C. § 5851. Complainant also made internal safety complainants when he raised concerns about plastic bags in the containment area, procedural noncompliance, and coworkers' fitness for duty. The ERA protects internal safety complaints. *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159, 1163 (9th Cir. 1984), *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510, 1513 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); *but see, Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). I find that Complainant engaged in protected activity.

Inclusion in a layoff constitutes adverse action. *See Nichols v. Bechtel Construction, Inc.,* 87-ERA-44 (Sec'y Oct. 26, 1992), slip op. at 11; *Emory v. North Bros. Co.*, 86-ERA-7 (Sec'y May 14, 1987), slip op. at 10. I find that Complainant was the subject of adverse employment action.

To establish the element of knowledge of Complainant's protected activity, the evidence must show that Respondent's managers responsible for taking the adverse action had knowledge of the protected activity. *Merriweather v. Tennessee Valley Authority*, 91-ERA-55, (Sec'y, Feb. 4, 1994). The I&C unit was first aware that someone would have to be severed on May 6, 1996. The date of Complainant first raised internal concerns was May 9, 1996. An investigation was not begun into Complainant's concerns until May 21, 1996. Ted Lutkehaus testified that it is not the policy of the ombudsman or quality assurance to reveal who raised the concerns that are being investigated. (TR 244-245) Jimmy Wright testified that the reason Complainant was not terminated on August 23, 1996, when he was informed he was being laid off was management had found out that there were ongoing investigations of allegations he had made internally and they wanted to ensure those were addressed. (TR 266)

The first date that any individual in Respondent's employ was aware that Complainant had gone to the NRC was May 21, 1996 and Henry Hegrat, the individual Complainant told, was not in Complainant's direct management chain. Further, in the meeting with Hegrat on May 21, Complainant told Hegrat that he did not want to discuss his concerns with his supervisors. Wright, the I&C superintendent, testified that he was not aware Complainant had gone to the NRC until after Complainant had been laid off. Complainant offered no evidence as to when his supervisors were aware of his protected activity, either his report to the NRC or his internal concerns, nor has he offered evidence that they were aware of his protected activity when the determination to eliminate his position was made. Therefore, I find that Complainant has not proven Respondent had knowledge of his protected activity when the decision to take adverse action against him was made.

Assuming for the sake of argument, that Respondent was aware of Complainant's protected activity when the decision was made to lay him off, Complainant cannot raise the inference that his protected activity was the reason for the adverse action. *Zinn, supra,* 93-ERA-34, slip. op. at 4. Although the timing of Complainant's activities, his complaint to the NRC on April 23, 1996, and the internal concerns raised on May 9, 1996, can be evidence of causation, Respondent's witnesses credibly testified that the decision to lay off Complainant was performance based and the forced rankings on which they based their decision were completed before Complainant engaged in any protected activity. *See White v. The Osage Tribal Council,* 95-SDW-1, slip op. at 4 (ARB Aug. 8, 1997). The most recent forced ranking was completed in January of 1996. Complainant stipulated that he had been the lowest ranked employee in his unit for the last two years and in 1994, he was ranked third from the bottom.

Further, the timing of Complainant's internal concerns is suspect. On May 6, 1996, it was determined there was going to be a layoff at PNPP. A plant-wide newsletter was circulated on May 9, 1996, announcing that there would be a layoff. Complainant went to the ombudsman and raised several internal safety and quality assurance concerns that same day, some of which dated back eleven years. Complainant's actions lend credibility to the testimony of Charles Moore, that Complainant told him he knew layoffs were coming and he was going to "cover my butt anyway I can." Therefore, I find that Complainant has not raised an inference by a preponderance of the evidence, that his protected activity was the reason for the adverse employment action.

Even if Complainant had established a prima facie case, Respondent has articulated a legitimate nondiscriminatory reason for the adverse action. *See Chavez v. Ebasco Services, Inc.*, 91-ERA-24 (Sec'y, Nov. 16, 1992) Respondent states that it laid off Complainant as part of a plant-wide reduction in staff. Respondent has been engaging in restructuring and periodic selective severance programs since 1993 in an effort to update its facilities. (TR 189) Complainant was one of 175 employees laid off in 1996. James Dailey, Ted Lutkehaus and Jimmy Wright credibly testified that the decision as to which employees would be laid off was performance based. This testimony is supported by Complainant's forced rankings. Complainant argues that this is pretext and the fact that the I&C unit hired two additional technicians after his position was eliminated proves this. However, Jimmy Wright credibly testified that the two individuals were not new hires, but individuals who had been in the I&C unit in supervisory and specialist positions who had been transferred back into technician positions as a part of the plant's restructuring. (TR 269, 278) Even if Complainant had established a prima facie case, I find that Respondent has established, by clear and convincing evidence, that it had a legitimate nondiscriminatory reason for laying Complainant off.

Based upon the above discussion, I find that Complainant has failed to satisfy his burden of proving a prima facie case by a preponderance of the evidence. The weight of the evidence proves that Respondent's sole motive in discharging Complainant was a plant-wide reduction in staff.

RECOMMENDED ORDER

For the foregoing reasons, Alfio Adornetto's claim of discrimination under § 5851 of the Energy Reorganization Act is hereby DISMISSED.

DANIEL L. LELAND
Administrative Law Judge

DLL/lwa/lab

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, DC 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 61 Fed. Reg. 19978 (1996).